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WILL IT HAPPEN AGAIN?—FAA’S DISASTROUS PRIOR EXPERIENCE WITH USER FEES

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I. INTRODUCTION

SEEKING TO PREVENT a looming fiscal crisis, the Federal Aviation Administration (“FAA”) is giving serious consideration to converting to a user fee system to fund its air traffic control (“ATC”) operations. These fees, which would be imposed directly on air carriers on a per-movement basis, would replace the long-utilized “Aviation Trust Fund,” comprised of taxes on domestic and international tickets and congressional appropriations. The FAA claims that its new “funding mechanism . . . should tie revenues raised for the system to the infrastructure and operational costs of the system.”¹ In November 2005, the FAA Administrator emphasized the imminent need for the FAA to convert to “a constant, stable revenue stream that’s related to the actual cost of services we provide.”²

* Partner, Sheppard Mullin Richter & Hampton, LLP. Through his representation of the Air Transport Association of Canada, the author helped to lead the coalitions of international air carriers which on three separate occasions over the course of eight years succeeded in striking down the FAA’s overflight user fees. The author wishes to acknowledge his mentor in that effort, Robert Kneisley, lead counsel and architect of the initial litigation over the fees. Mr. Kneisley is now Associate General Counsel for Southwest Airlines.

¹ Aviation Financing Reauthorization, 70 Fed. Reg. 54,100 (proposed Sept. 13, 2005); *see also* Marion C. Blakey, Administrator, FAA, “You Need to Weigh In,” Speech before the Trust Fund Forum (April 25, 2005), *available at* <http://www.fed.gov/news/speeches/speeches/blakey/2005/speeches-blakey—050425.htm> (“Tying fees to the cost of providing service will serve to protect both the FAA and its customers.”); “Trust Fund Taxes Set to Expire in 2007,” FAA 2005, at 4, *available at* http://www.fed.gov/news/testimony/testimony/2005/trust_funds.pdf (last visited Feb. 7, 2006) (“FAA needs a consistent, stable revenue stream that is not tied to the price of an airline ticket but rather reflects our actual cost to provide service.”).

² Marion C. Blakey, Administrator, FAA, A Sense of History, Speech at the Aero Club of Washington (Nov. 28, 2005).

This would not be the agency's first experience with attempting to raise revenue via user fees. In 1997 the FAA started to impose user fees for air traffic control services provided to "overflights," i.e., flights that travel through U.S.-controlled airspace, but neither take off nor land in the United States. Overflights are typically operated by foreign airlines, with Canadian carriers accounting for about half and a mix of carriers from Europe, Asia and Latin America making up the balance. Overall, overflights account for less than two percent of all FAA-controlled flight operations.

The FAA's experience with overflight user fees was an unmitigated disaster. On three separate occasions over the course of eight years, from 1997 to 2004, the U.S. Court of Appeals for the D.C. Circuit struck down the FAA's overflight fees because they did not comply with the statutory mandate that the fees must be directly related to the FAA's costs of providing the services rendered.³ As a result, the FAA was forced to refund or forego collection of hundreds of millions of dollars in fees over those eight years.

How did this happen? In its single-minded pursuit of additional revenue, the FAA repeatedly failed to ensure that its fee methodology reflected the agency's actual costs of providing services to *overflights*. The agency clung stubbornly to unsupportable positions adopted without empirical evidence and prior to inviting industry comments. This was followed by sham "public meetings" in which panels of stone-faced FAA officials refused to respond to a litany of industry presentations that expressly detailed why the fees were unlawful.

Even worse, rather than learning from the adverse court decisions regarding how the fees should be modified to meet the statutory criteria, the FAA repeatedly went to Congress in search of legislative "fixes" to weaken the requirement that the fees be strictly cost-based, and even to bar affected carriers from seeking judicial review of the fees. From the FAA's perspective, all of its actions were beyond reproach; its only "problem" was the oversight of the courts and their power to require the FAA to strictly adhere to the law.

³ *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998); *Air Transp. Ass'n of Can. v. FAA*, 254 F.3d 271, 278 (D.C. Cir. 2001) [hereinafter *ATAC I*], *modified*, 276 F.3d 599 (D.C. Cir. 2001); *Air Transp. Ass'n of Can. v. FAA*, 323 F.3d 1093 (D.C. Cir. 2003) [hereinafter *ATAC II*].

None of this bodes well for the FAA's conversion of its entire funding structure to a user fee system, particularly considering that foreign overflights account for such a small amount of the FAA's air traffic control activity. What is to constrain the FAA from once again ignoring industry comments and adopting fees that are not tied to its actual costs to provide the services rendered? A repeat of the overflight user fee fiasco on a much wider scale could easily wreak fiscal havoc on airlines. Extreme vigilance by the aviation community before Congress, the FAA and, if necessary, the courts, is essential to safeguard the industry from a recurrence of the overflight fee disaster.

A. OVERFLIGHTS

An "overflight" occurs when an aircraft enters U.S.-controlled airspace, but does not take off or land in the United States. For example, a flight from Toronto to Mexico City will enter airspace that is controlled by FAA personnel, even though it never touches the ground in the United States. "Enroute" operations are when the aircraft flies over the land that consists of the United States; "oceanic" operations are those where the aircraft flies in airspace over oceans that are controlled by the United States. The U.S. controls large swaths of oceanic airspace, such that aircraft which do not come within thousands of miles of the United States may still be subject to FAA overflight fees.

B. CONGRESSIONAL AUTHORIZATION FOR OVERFLIGHT USER FEES

In October 1996, Congress enacted section 273 of the Federal Aviation Reauthorization Act of 1996.⁴ The Act for the first time authorized the FAA to impose a user fee in connection with the provision of air traffic control services. The FAA was directed to establish a fee schedule and collection process to cover "[a]ir traffic control and related services provided to aircraft other than military and civilian aircraft of the United States government or of a foreign government that neither take off from, nor land in, the United States."⁵

The intent of the Act was to enable the agency to establish a predictable and reliable revenue stream to compensate the agency for the costs of providing air traffic control services to

⁴ Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (1996).

⁵ 49 U.S.C. § 45301(a)(1) (1996).

overflights. As it turned out, that goal was not achieved for the next eight years due to the FAA's critical miscalculations and its systematic failure to correct them.

The FAA's most fundamental error was a failure to understand that the 1996 Act authorized a strictly cost-based *fee*, not an unconstrained *tax*, on overflights. Thus, the statute required the FAA to "ensure that each of the fees . . . [was] directly related to the Administration's costs . . . of providing the service rendered."⁶ Covered services "include[d] the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States."⁷

Optimistically (as it turned out), the statute authorized the FAA to recover up to \$100 million annually from the fees.⁸ Finally, the statute instructed the FAA to "publish in the Federal Register an initial fee schedule and associated collection process as an interim final rule, pursuant to which public comment will be sought and a final rule issued."⁹

II. STRIKE ONE: THE FAA'S 1997 UNSUCCESSFUL OVERFLIGHT USER FEES

In March 1997 the FAA issued an "initial interim final rule" establishing a fee schedule and collection process for overflights, with an effective date sixty days later.¹⁰ The overflight fees were computed based on distance flown through U.S.-controlled airspace.¹¹ Separate computations were made for services provided in enroute and oceanic airspace in order to reflect the FAA's different costs of providing services in each of those environments.¹² Carriers were required to pay a per-100-nautical mile fee of \$78.90 for enroute operations and \$69.50 for oceanic flights.¹³ It was probably no coincidence that the

⁶ 49 U.S.C. § 45301(b)(1)(B).

⁷ 49 U.S.C. § 45301(b)(1)(B).

⁸ 49 U.S.C. § 45301(b)(1)(A).

⁹ 49 U.S.C. § 45301(b)(2).

¹⁰ Fees for Air Traffic Services for Certain Flight Through U.S.-Controlled Airspace, 62 Fed. Reg. 13,496 (proposed Mar. 20, 1997).

¹¹ *Id.* at 13,499.

¹² *Id.*

¹³ *Id.*

FAA estimated the expected revenue would be approximately equal to the statutory maximum of \$100 million annually.

The FAA's fees were based almost exclusively upon a single study prepared by a private consultant, GRA, Inc., entitled "Analysis of Overflights: Costs and Pricing."¹⁴ The FAA explained that services provided to overflights required both (1) incremental expenditures, which increase with the quantity of services provided, and (2) fixed and common expenditures for facilities and other expenses, which cannot be attributed to particular flights or classes of flights.¹⁵ The GRA study allocated fixed costs among all classes of users using "Ramsey pricing" methodology. This methodology distributes costs among classes of users based on the elasticity of their demand for services, in an effort to minimize the effect of the regulation on the behavior of users. Thus, under this method of allocating fixed costs, users that are less sensitive to changes in price are allocated a relatively greater share of fixed and common costs.

The FAA did not invite industry comments on the fees before they were scheduled to go into effect and refused industry requests to postpone their effectiveness until after the FAA responded to public comments. Nevertheless, the Air Transport Association of Canada ("ATAC") filed objections with the FAA that the fees were impermissibly based on the "value" to the user, rather than the FAA's cost of providing the services rendered, and thus resembled a tax more than a cost-based fee.

The FAA ignored this objection as well as numerous other criticisms submitted by a large number of international air carriers and organizations. Similarly, the FAA held a "public meeting" during which industry representatives were permitted to make presentations critical of the fees, but the FAA officials in attendance refused to defend the fees or even to engage in discourse with the speakers. It was truly a sham proceeding.

Given the FAA's complete unwillingness to engage in any kind of meaningful dialogue with affected carriers about the new fees and its unusual methodology to calculate them, litigation appeared inevitable. The airlines believed that the FAA's fees were far in excess of the FAA's costs of providing ATC services to overflights, and they had reason to know, for they had a great deal of experience dealing with similar fees charged by many other countries. In fact, only two years earlier, the Cana-

¹⁴ *Id.*

¹⁵ *Id.*

dian government had radically revamped its system for aviation funding by creating a new charging authority (NAV Canada) to impose user fees on air carriers for their use of ATC services. Based on that experience, ATAC believed that the FAA's fees were nearly *triple* what they should have been—i.e. that the FAA's total annual costs of overflight services were closer to \$35 million than the \$100 million sought by the FAA.

But ATAC and the other international carriers did not seek litigation. In fact, they took extraordinary steps to avoid it. Before the new fees became effective, ATAC sought a meeting directly with senior policy officials of both the Department of Transportation ("DOT") and FAA. At that meeting, ATAC explained that it had no objection to the principle of FAA charging fees to recover its costs; rather, the question was the proper level of such fees. ATAC drew on the Canadian experience, pointing out that NAV Canada had engaged in an intensive, nearly *two-year* period of fact-finding, dialogue, and negotiation with users before setting its ATC fees. ATAC explained that such a lengthy period was necessary given the complexity of issues and data involved, as well as the fact that the process was radically new to both the government and the airlines – the same conditions facing the FAA. The Canadian negotiations between the parties emphasized inclusion of stakeholders and were characterized by transparency of data. As a result, when NAV Canada finally imposed its fees, no litigation occurred.

ATAC urged the DOT and the FAA to heed the Canadian experience by establishing a full and open dialogue with the user community, making its cost data transparent to the public, and only then determining the appropriate fee levels. The senior officials of both the DOT and the FAA summarily rejected these pleas. They claimed there was no need for prior-notice-and-comment rulemaking, and that the FAA was simply following Congress' direction to proceed with an interim final rule ("IFR"). When ATAC pointed out that the statute in no way precluded the FAA from consulting with affected parties before issuing an IFR and that the FAA would likely reach a more informed and less controversial decision by doing so, the senior policy officials simply demurred. As the DOT's then general counsel put it, "Congress wants us to collect these fees," as though that were a complete answer to all criticisms of the fees.

As the FAA summarily rejected all efforts by affected parties to engage in dialogue before the fees were imposed, ATAC and several foreign airlines filed petitions for review of the overflight

fees with the D.C. Circuit. Although the court declined the carriers' request to stay the fees' effectiveness, it did render a decision on the merits quickly. In January 1998 the D.C. Circuit issued the first of several decisions striking down the FAA's fees.¹⁶

In granting the petitions, the court held that "insofar as the FAA allocated fixed and common costs using the Ramsey pricing methodology, its fee structure impermissibly included a component based on value to the user."¹⁷ The court explained that the "[s]tatutory language requiring that 'each' fee be 'directly related to . . . the costs of providing the service rendered' expresse[d] a clear congressional intent that fees must be established in such a way that each flight pays according to the burden associated with servicing that flight."¹⁸ There "may be methods to reasonably determine an appropriate fraction of the FAA's fixed costs to assign to each overflight, and if the FAA does not have enough information to precisely determine the burdens imposed by individual flights, it may proceed based on the best data available."¹⁹ "However, [the FAA] may not set fees on a basis other than cost. In this case it attempted to do so when it apportioned its costs among user groups based on each group's relative sensitivity to the amount charged."²⁰

The court acknowledged the FAA's assertion that Ramsey pricing was not used to *establish* costs based on the value of such costs to users, but rather to *apportion* those costs, but explained:

This distinction drawn by the FAA illuminates the very pit into which it has fallen: although it is true that the total cost figure is based on real cost data and not on a "market price" for services, the fact is that the FAA has distributed those costs among all users of the system based on the value of services as perceived by each group of users. "The problem arises because the FAA chooses to understand 'costs' at too high a level of generality."²¹

Because the court found no way to "circumscribe a component of the fees based entirely on direct costs of services," it vacated the FAA's "fee schedule in its entirety."²² As a result, the FAA was required to refund all of the fees it had collected to

¹⁶ *Asiana*, 134 F.3d 398.

¹⁷ *Id.* at 401.

¹⁸ *Id.* at 402.

¹⁹ *Id.* at 402-03.

²⁰ *Id.* at 403.

²¹ *Id.* at 402.

²² *Id.* at 403.

that point, nearly fifty-million dollars. The FAA also was precluded from continuing to impose *any* user fee on overflights until a new rule could be issued.

The FAA's adoption of a fee based on *value* rather than *cost* was especially ironic given its express acknowledgement that the fees could not be based on the weight of the aircraft because "the use of weight when viewed as a measure of *value* of the service to the user is not consistent with the FAA's current authority."²³ Thus, although the FAA was well aware that its fees could not be based on value to the user, it nevertheless attempted to impose fees that were in fact based on the value to the user.

In subsequently granting ATAC's request for attorneys' fees under the Equal Access to Justice Act ("EAJA")²⁴, the court admonished the FAA for attempting to "completely displace Congress" in its setting of the fees.²⁵ The court found that the FAA could not even satisfy the modest EAJA requirement that its litigation position have been "substantially justified" on the law and the facts:

[The FAA] insists that because the total price structure was designed to recover the Administration's costs, that meant that the scheme complied with the statutory requirement that 'each of the fees' be 'directly related' to the cost of providing the service rendered. All that the [FAA's] reasoning can establish is that the totality of the fees charged all users is ultimately related to the cost of providing all services. We cannot hold that an attempt by an agency to completely displace Congress is substantially justified.²⁶

III. STRIKE TWO: FAA'S 2000 UNSUCCESSFUL OVERFLIGHT USER FEES

Given the humiliation that the FAA suffered before the court with its initial overflight fees, the international carriers had reason for optimism that the agency would do whatever was necessary to prevent a repeat performance. They believed that the FAA most certainly would involve the users in meaningful discussions before adopting a methodology for new overflight fees, and that the agency would take other steps to ensure that there

²³ Fees for Air Traffic Services for Certain Flights through U.S.-Controlled Airspace, 62 Fed. Reg. 13,496 (Mar. 20, 1997) (emphasis added).

²⁴ 28 U.S.C. § 2412(d)(1)(A) (2000).

²⁵ Air Transp. Ass'n of Can. v. FAA, 156 F.3d 1329, 1332-33 (D.C. Cir. 1998).

²⁶ *Id.* (emphasis in original).

would be no legitimate objections to the fees. Unfortunately, these expectations were dashed by the FAA. Although the FAA's new fees were less than half the level of the initial fees, the agency refused to make its cost data transparent to users, its fee-setting methodology was suspect from the outset, and the FAA again refused to consult with affected parties before making the fees effective.

In June 2000 – approximately two and one-half years after the court vacated the initial overflight user fees – the FAA issued a second IFR for overflight fees. The new fees were in the per-100 nautical mile amount of \$37.43 for enroute and \$20.16 for oceanic.²⁷ The “user fee [was] expected to generate approximately \$39.6 million in billings during the first 12 months.”²⁸ The fees were developed without industry input and were scheduled to go into effect before comments were received.

The report which accompanied the new IFR explained that the fee development process involved four steps:

- (1) determining FAA's full costs of providing both enroute and oceanic air traffic control services to all flights – that is, overflights and non-overflights;
- (2) determining which of the costs identified in step one met the requirement of being “directly related” to the services rendered by the FAA;
- (3) determining, based on the costs computed in step two, unit costs for providing enroute and oceanic air traffic control services to overflights; and
- (4) establishing overflight fees that cover air traffic control service costs as well as billing and collection costs.²⁹

“To compute the ‘unit costs’ (step three), the FAA divided the ‘directly related’ costs identified in step two by the total number of miles flown by all aircraft using the same enroute airspace and oceanic airspace, respectively.”³⁰ The FAA stated:

Because the level of [air traffic control] services are [sic] assumed identical for all aircraft operations within a particular environment (i.e., enroute or oceanic), it is reasonable to assume that the costs of providing [air traffic control] services to overflights . . . within each environment is [sic] identical to the unit

²⁷ Fees for FAA Services for Certain Flights, 65 Fed. Reg. 36,002 (June 6, 2000).

²⁸ *Id.*

²⁹ *ATAC I*, 254 F.3d at 276.

³⁰ *Id.*

costs of providing [air traffic control] services to all air traffic within each environment.³¹

As before, ATAC and other affected parties filed objections to the fees before they became effective. As before, the agency ignored them. ATAC pointed out, among other things, that overflights are different than non-overflights because the former fly in higher altitudes and do not require air traffic control assistance to ascend or descend either to airports or to lower altitudes surrounding airports.³² Thus, they require relatively little in the way of ATC services compared to non-overflights, which must move through lower altitudes.³³

The agency again summarily rejected all criticisms of the fees. And again the FAA convened a "public meeting" at which stone-faced officials yet again refused to defend the fees or engage in any dialogue with the many industry representatives who presented detailed objections.

As had occurred three years earlier, ATAC and other parties tried to avoid litigation by meeting with senior DOT and FAA officials before the fees became effective. The carriers cautioned the FAA against repeating its previous mistake and urged the agency to involve users in the fee-setting process *before* imposing new fees, either via a notice-and-comment rulemaking or an informal consultation. They stressed that while prior consultation with users would marginally delay the collection of new fee revenue, it would ultimately work to the government's advantage by ensuring that the new fees would be much less likely to be challenged. But as had occurred three years earlier, the senior government officials summarily rejected these pleas. They asserted that the FAA had the authority to impose new fees via an IFR and there was simply no reason to slow down the process. They also boasted that carriers would have no valid basis for objecting to the FAA's new fee-setting methodology.

³¹ *Id.*

³² When aircraft are taking off from a major U.S. airport, they are controlled by FAA personnel within the tower at the airport. However, shortly after taking off, aircraft are handed off to controllers at one of several enroute air route centers or oceanic centers the FAA operates to handle aircraft coming from and to a variety of U.S. airports, as well as overflights.

³³ Even the traveler who casually listens to cockpit-to-controller transmissions (e.g., Channel 9 on United Airlines domestic flights) can appreciate that an aircraft that has just left the airport terminal controller environment and is in the process of climbing to the higher altitudes engages in more frequent contacts with air traffic controllers during that transitional process than once the aircraft is closer to its cruising altitude.

Clearly, the government had learned no lessons from its prior debacle.

As all efforts to engage the FAA in a meaningful dialogue were resoundingly rejected, a coalition of foreign parties again challenged the FAA's fees in the D.C. Circuit. Again, the court struck down the fees. In a July 2001 decision, the D.C. Circuit found that the FAA had presented "no record support" for its assumption "that the FAA incurs the same costs in providing service to overflights and nonoverflights using either the enroute airspace or the oceanic airspace."³⁴ The court stated that "[t]o survive arbitrary and capricious review, the 2000 Rule must contain a 'satisfactory explanation' for the FAA's conclusion that the overflight fees imposed are 'directly related' to the FAA's cost of providing service to overflights," and that "[i]n view of the methodology followed by the FAA in establishing the fees, there must be at least *record support* for the proposition that the FAA incurs the same costs in providing service to overflights and nonoverflights using either the enroute airspace or the oceanic airspace."³⁵ "Because the FAA . . . failed to articulate the basis for its conclusion that 'the unit costs of providing [air traffic control] services to overflights within each environment is [sic] identical to the unit costs of providing [air traffic control] services to all air traffic within each environment,'" the court vacated the 2000 IFR.³⁶

IV. STRIKE THREE: FAA'S 2001 UNSUCCESSFUL OVERFLIGHT USER FEES

On August 20, 2001—approximately five weeks after the court struck down the FAA's second IFR for overflight user fees—the FAA issued a "Final Rule" for overflight fees.³⁷ The Final Rule was essentially identical to the 2000 IFR that the court had just vacated, but contained a more elaborate justification. Significantly, the agency retained the judicially discredited assumption that it incurs virtually identical per-mile costs in servicing both overflights and non-overflights within each ATC environment.

The agency also took the position that because it had issued a Final Rule, the recent court decision vacating the second in-

³⁴ *ATAC I*, 254 F.3d at 278.

³⁵ *Id.* at 278 (emphasis added; citation omitted).

³⁶ *Id.*

³⁷ Fees for FAA Services for Certain Flights, 66 Fed. Reg. 43,680 (Aug. 20, 2001).

terim rule should be nullified, at least until the court had an opportunity to decide whether the Final Rule cured the defects identified by the court. Thus the FAA petitioned the court for rehearing, requesting that the IFR be remanded without vacatur so that the FAA would not be required to refund fees collected to date if the court ultimately were to conclude that the Final Rule provided the IFR's missing "record support" for the identical cost assumption.

Significantly, the FAA promised to refund *all* fees collected under both the IFR and the Final Rule if the court were to "find that the FAA's methodology departs from the statutory standard"³⁸ In December 2001, the court granted the FAA's petition for rehearing,³⁹ and thereby tied the fate of the fees collected under the second interim rule to the Final Rule.

In comments on the 2000 IFR, affected carriers reiterated their prior objections that the FAA's costs of providing ATC services to overflights were substantially lower than for non-overflights, and submitted supporting declarations by two former FAA air traffic control experts, with several decades of years of combined experience in enroute and oceanic sectors. These experts contended that (1) traffic controller costs are not "fixed," because the FAA varies the number of controllers on duty 'depending on the volume of aircraft operating within the particular geographical area or sector'; (2) flights in the "high-altitude" sector (18,000 feet and above) require far less controller attention per mile than flights in the "low-altitude" sector; (3) overflights occur more exclusively in the high-altitude sector; and (4) by virtue of these differences and FAA practices, there are means to allocate controller time between overflights and non-overflights.⁴⁰

The 2001 Final Rule provided four arguments in response to these criticisms:

1. The agency incurs the "vast majority of costs by making its comprehensive [air traffic control system available to all flights (regardless of the type of aircraft. . .)];
2. The FAA's "marginal cost, including labor cost, for providing services to any flight is close to zero";

³⁸ Petition for Rehearing at 4, 14, *Air Transp. Ass'n of Can. v. FAA*, 276 F.3d 599 (D.C. Cir. 2001) (No. 00-1334).

³⁹ *Air Transp. Ass'n of Can. v. FAA*, 276 F.3d 599 (D.C. Cir. 2001).

⁴⁰ Fees for FAA Services for Certain Flights, 66 Fed. Reg. 43,680 (Aug. 20, 2001).

3. “[T]he majority of FAA’s costs are common and fixed costs”; and
4. The controllers’ responsibilities “for Overflights are not fundamentally any different than for non-Overflights.”⁴¹

A. BEFORE THE COURT’S DECISION FAA SEEKS A LEGISLATIVE
FIX

Frustrated by its most recent judicial defeat, the FAA decided to try to seek relief in Congress. The agency succeeded in getting language added to the post-9/11 Aviation and Transportation Security Act of 2001,⁴² (“ATSA”) that the FAA believed would make it easier for the agency to prevail in court. This new language replaced the requirement in the 1996 Act that the fees be “directly related” to the FAA’s costs of the services rendered with a requirement that the fees be “reasonably related” to such costs.⁴³ In addition, the new law provided that “The Determination of such costs by the Administrator is not subject to judicial review.”⁴⁴

These significant statutory changes were adopted without hearings or any other legislative history; they simply appeared in the final version of the bill. The FAA obviously hoped that these changes in the governing statute would save it from further judicial embarrassment. As it turned out, the FAA’s hopes were unfulfilled.

B. THE APRIL 2003 DECISION STRIKING DOWN THE FINAL RULE

In April 2003, the court struck down the FAA’s Final Rule for overflight user fees:

For the third time, we must review the lawfulness of a Federal Aviation Administration regulation establishing fees for air traffic control services for “overflights” For the third time, we find that the FAA disregarded its statutory mandate.⁴⁵

The court found that the petitioners’ experts had made “a substantial case refuting the agency’s unexplicated insistence that miles of overflights and non-overflights in the Enroute and Oceanic airspaces are approximately equivalent in their per-

⁴¹ *Id.*

⁴² Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 597 (2001).

⁴³ *Id.* § 119(d).

⁴⁴ *Id.*

⁴⁵ *ATAC II*, 323 F.3d at 1094.

mile generation of costs.”⁴⁶ In a particularly humiliating passage, the court observed that:

In response the agency offers what amounts to little more than conclusory denials.

Although consideration of the agency’s specific arguments may seem like flogging a dead horse, we proceed with the exercise so that it may be assured that we have scrutinized its arguments.⁴⁷

The court acknowledged the FAA’s assertion that *some* overflights spend *some* time at low altitudes, but pointed out that this did “not undermine petitioners’ claim that they fly predominately in the high altitude sector, to a degree far greater than do non-overflights.”⁴⁸ The court also rejected the FAA’s contention that fixed and common costs dominate, and therefore any difference in the marginal cost of servicing an additional overflight versus an additional non-overflight is immaterial.⁴⁹ The court emphasized the petitioners’ evidence that overflights occur almost exclusively in the high-altitude range, that the FAA makes separate assignments of controllers for that sector, and that the FAA’s per-mile aircraft servicing costs are systematically lower in the high-altitude range.⁵⁰

In addition, the court dismissed the FAA’s argument that its attempted legislative fix—section 119 of ATSA—applied to the case at hand so as to deprive the court of jurisdiction to review the FAA’s cost determination.⁵¹ The court noted that ATSA’s “savings clause”—section 141(d)—provided: “This Act shall not affect suits commenced before the date of the enactment of this Act In all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and with the same effect as if this Act had not been enacted.”⁵² The court found that this clear language rendered the November 2001 changes to the overflight fee statute inapplicable to the present case, which was already underway when ATSA was enacted.⁵³ The court also rejected the FAA’s “exceptionally lame reliance

⁴⁶ *Id.* at 1096.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1097.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1095.

⁵² *Id.*

⁵³ *Id.*

on legislative history” to argue that ATSA’s savings clause did not apply to the challenge to the overflight fees.⁵⁴

C. THE FAA RENEGES ON ITS COMMITMENT TO REFUND THE
INVALIDATED FEES, AND INSTEAD SEEKS YET ANOTHER
LEGISLATIVE FIX

Having been set aside by the court, the FAA’s 2001 Final Rule was void of any legal authority. At that point the FAA should have refunded all of the fees collected since June 2000, as had occurred after the Court vacated its first overflight fee rule. Indeed, in seeking and obtaining rehearing of the July 2001 decision vacating the 2000 IFR, the FAA had promised that if the Final Rule were struck down, it would refund *all* fees collected since 2000, under *both* rules.⁵⁵ However, the FAA ultimately reneged on this express commitment.

In May 2003, the FAA petitioned for rehearing of the court’s decision striking down the 2001 Final Rule.⁵⁶ The FAA claimed that based on the language of the decision, it should only be required to refund that portion of the approximately seventy-five million dollars in collected fees reflecting certain air traffic controller labor costs, which the court found to be unsupported by the administrative record.⁵⁷ The FAA claimed it was under no obligation to return fees “calculated independently of that error.”⁵⁸ The court denied the agency’s petition in July 2003.⁵⁹ But the agency was still not finished trying to avoid the results of its loss in court.

For several months during 2003, the agency lobbied Congress for yet another legislative fix to nullify the latest unfavorable court ruling. To buy more time for these efforts, the FAA prevailed on the U.S. Solicitor General to seek a series of extensions of the deadline for filing a petition for writ of certiorari to the U.S. Supreme Court. In October 2003, the Supreme Court denied further extensions of time, and the Solicitor General did not file certiorari. But the delay allowed the FAA to get what it wanted from Congress.

⁵⁴ *Id.*

⁵⁵ Petition for Rehearing at 4, *Air Transp. Ass’n of Can. v. FAA*, 276 F.3d 599 (D.C. Cir. 2001) (No. 00-1334).

⁵⁶ Petition for Rehearing, *Air Transp. Ass’n of Can. v. FAA*, 323 F.3d 193 (D.C. Cir. 2003) (No. 01-1446).

⁵⁷ *Id.* at 2.

⁵⁸ *Id.*

⁵⁹ *ATAC II*, 323 F.3d 1093 (petition for rehearing denied July 3, 2003).

In December 2003, at the FAA's urging, Congress enacted legislation that the FAA hoped would retroactively nullify the court's April 2003 decision to vacate the Final Rule.⁶⁰ The FAA's language was a true "political fix" inserted into an omnibus FAA authorizing bill with no hearings or discussion. It sought to replace the judicial function with legislative fiat:

The interim final rule and final rule referred to in subsection (a), including the fees issued pursuant to those rules, are adopted, legalized, and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically adopted, authorized, and directed as of the date those rules were originally issued.⁶¹

In addition, to avoid application of the ATSA "savings clause" that had undermined the FAA's earlier attempted legislative fix, the new statute purported to make the November 2001 "fix" applicable to the FAA's current fees:

Notwithstanding section 141(d)(1) of the Aviation and Transportation Security Act [the amendments to the 1996 Act for overflight fees are] deemed to apply to and to have effect with respect to the authority of the Administrator of the Federal Aviation Administration with respect to the interim final rule and final rule, relating to overflight fees, issued by the Administrator on May 30, 2000, and August 13, 2001, respectively.⁶²

In response to requests for refunds of the invalidated fees, the FAA instead issued a notice requesting comments on the new legislative language in section 229 of Vision 100. The FAA characterized the effect of the new law as follows:

Although the courts have vacated the rules adopted by the FAA to implement [the Act], Congress has enacted recently Vision 100 – Century of Aviation Reauthorization Act . . . that legislatively adopts the FAA rules, as well as the fees established by those rules, as of the date of their original issuance.⁶³

The FAA's attempt to "fix" the unfavorable April 2003 court decision with retroactive statutory amendments was irresponsible in the extreme. Not only was it unfair to the airlines that had proven the fees to be unlawful, but it also improperly at-

⁶⁰ Vision 100 – Century of Aviation Reauthorization Act, Pub. L. 108-176, § 229 (2003).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Notice of FAA Final Order Directing the Disposition of Certain Overflight Fees Collected by the FAA, 69 Fed. Reg. 47,201 (Aug. 4, 2004).

tempted to remove the check and balance of judicial oversight from the FAA going forward. While this may have advanced the FAA's short-term goals, it set a terrible precedent. Allowing the government to impose millions of dollars in fees without affording affected parties a meaningful right of judicial review is neither democratic nor consistent with due process. Nor is it something that U.S. airlines would want to have visited upon them by foreign providers of air traffic control services. The "ends" of the FAA – to raise revenues and avoid further court defeats – in no way justify the means that the agency propounded and Congress enabled.

In August 2004, approximately eight months after the enactment of section 229, the FAA issued a notice announcing the agency's decision to refund all fees it had collected from all carriers prior to November 19, 2001 (the date of its earlier attempted legislative fix, section 119 of ATSA).⁶⁴ In addition, pursuant to a settlement reached between the FAA and the parties that had successfully challenged the 2000 IFR and the 2001 Final Rule, the FAA agreed to "make payments to the litigating [carriers] from previously collected fees" based on a formula agreed to by the parties "in addition to whatever refunds and credits" were otherwise available to the litigating carriers.⁶⁵

Following the settlement, the FAA resumed assessment and collection of overflight fees based on the methodology of the (now Congressionally approved) Final Rule. However, as part of the settlement with the litigating carriers, the FAA agreed to convene an Aviation Rulemaking Committee ("ARC") consisting of the FAA and industry representatives to examine, in-depth, the FAA's methodology for overflight fees and to recommend whether it should be modified.⁶⁶ The ARC process is continuing. The manner in which the FAA handles the ARC will provide an important clue whether the agency has finally learned from its mistakes in this litigation and will now engage in a meaningful dialogue with the industry in setting fees. However, the presence of the statutory limitation on judicial review that the FAA succeeded in obtaining from Congress casts a dark cloud over this process. It would ill-serve both the government and industry if the FAA were to succumb to the temptation of this provi-

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Notice of the Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter, 69 Fed. Reg. 47,203 (Aug. 4, 2004).

sion to avoid its continuing obligation to set cost-recovery fees rather than impose an unconstrained tax on captive users.

V. CONCLUSION

Over the eight-year course of this litigation, the FAA was rebuked by the Court of Appeals in four separate decisions and never did manage to produce fees that complied with the law's cost-recovery standard in the eyes of the court. This is an astonishingly dismal record considering the wide degree of deference that the courts traditionally give federal agencies in matters within their expertise. In this case, however, the only reason the FAA was able to finally succeed in imposing overflight fees was not because of its technical expertise, but rather its raw *political power* (coupled with the foreign carriers' lack thereof).

The FAA's conduct in response to its serial court defeats was disgraceful. Rather than engage in consultations with users, make its decision-making process transparent, and strive for a consensual outcome – which would have eliminated almost any possibility of litigation – the FAA repeatedly dug in its heels and looked to Congress for protection. And, when its effort to weaken the statute to ensure a government court victory failed to succeed, the FAA took even more extreme measures, persuading Congress to codify the fees in law and hamper future judicial oversight.

This experience raises serious questions about the FAA's ability to convert virtually its entire budget to a user fee system. After all, one may legitimately ask, if the FAA cannot properly construct user fees for an activity of *less than fifty-million dollars*, how can it be relied on to construct user fees to raise for *fourteen-billion dollars*⁶⁷ or more?

There are nevertheless some hopeful signs. Administrator Blakey and her senior advisors should be given credit for finally ending the vexatious overflight litigation that they inherited from previous Administrations.⁶⁸ At this early stage in the process, the FAA appears to be proceeding cautiously and responsibly in the all-important debate over a future funding system.

⁶⁷ See Press Release, Dep't of Transp., Sec'y Mineta Announces \$59.5 Billion Budget for FY 2006 to Fund Vital Transp. Projects (Feb. 7, 2005), *available at* <http://www.dot.gov/affairs/dot2305.htm> (stating that the DOT FY 2006 budget request "includes \$14 billion for the Federal Aviation Administration").

⁶⁸ FAA Chief Counsel Andy Steinberg and DOT General Counsel Jeff Rosen were particularly helpful in that process.

In particular, the FAA is seeking involvement by major stakeholders and hopefully is pursuing a consensual decision-making approach. There are also indications that the FAA has gained better knowledge of its costs and therefore may be able to relate them more closely to the ATC services it provides to aviation users.

Yet, one is reminded of Ronald Reagan's admonition to "trust, but verify." In light of the FAA's disastrous experience with overflight user fees, the aviation community would be wise to take concrete steps to protect itself from a recurrence of such a debacle - on a much wider scale.

At a minimum, the industry should strive to obtain the following safeguards:

1. The FAA's assurance that any user fees are based on the FAA's actual costs of providing the services rendered to the user.
2. A completely transparent cost accounting system at the FAA.
3. The FAA's making publicly available all documents and information that form that basis for the FAA's fee methodology.
4. The provision by the FAA of empirical support for any assumptions that underlie the fee methodology.
5. The FAA's commitment to timely seek, and give genuine consideration to, industry comments *prior* to the agency's decision on the fee methodology.
6. An extensive and authentic public discourse between the FAA and aviation industry members in which agency officials consider, refer and react to the points being made by the industry representatives.
7. A right of meaningful judicial review of the fee methodology used by the FAA and its application to affected carriers.

By following these measures, both the government and industry will benefit. Air carriers and other users will be secure in the knowledge that the fees they are paying were subject to extreme scrutiny in an open and consensual process involving all stakeholders. And as a result, the FAA may well be able to establish a reliable, cost-based revenue stream free of the uncertainty and disruption of serious litigation. In other words, the very availability of unfettered judicial review may make its use unnecessary.

Given the enormity of what is at stake, such an outcome will not come easily, but it is certainly to be hoped for.

Casenotes

